Supreme Court, U.S.
FILED
JUN 25 1993

Nos. 92-757 and 92-938

In the Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF, *Petitioner,*

v.

USI FILM PRODUCTS, ET AL., *Respondents.*

MAURICE RIVERS AND ROBERT C. DAVISON, *Petitioners,*

v.

ROADWAY EXPRESS, INC., *Respondent.*

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

---

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AND ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

DANIEL R. BARNEY
ATA Litigation Center
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1865

KENNETH P. KOLSON
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

JAMES D. HOLZHAUER
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
JAVIER H. RUBINSTEIN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, applies retroactively to claims pending on or conduct occurring before the date of enactment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICI CURIAE 1

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE RULE THAT STATUTES NOT BE GIVEN RETROACTIVE EFFECT UNLESS CONGRESS EXPRESSLY PROVIDES FOR SUCH AN EFFECT HAS BEEN CONSISTENTLY APPLIED BY THIS COURT FOR NEARLY 200 YEARS AND IS BASED ON SOUND PUBLIC POLICIES. 5

A. For Nearly 200 Years, This Court Has Consistently Applied The Presumption That New Statutes Are Not Retroactive. 7

B. The Traditional Rule Is Based On Sound Public Policies. 12

C. *Bradley* and *Thorpe* Need Not Be Viewed As Deviating From The Traditional Rule. 16

II. THE PRESUMPTION AGAINST RETROACTIVITY FULLY APPLIES TO THE CIVIL RIGHTS ACT OF 1991. 18

A. *Bennett* Does Not Support A Presumption In Favor Of Retroactivity. 20

Page

B. Prior Decisions Of This Court Do Not Support Petitioners' Distinction. 22

C. The Presumption Against Retroactivity Precludes Application Of A New Law That Would Change The Consequences Of Prior Conduct. 24

D. The Far-Reaching Provisions of the 1991 Civil Rights Act Should Not Be Applied Retroactively. 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page**

Baugher v. *Nelson*, 9 Gill 299 (Md. 1850) 12

Bedford v. *Shilling*, 4 Serg. & Rawl. 401 (Pa. 1818) 12

Bennett v. *New Jersey*, 470 U.S. 632 (1985) 14, 20, 21, 23

Blanchard v. *Sprague*, 3 F. Cas. 648 (C.C.D. Mass. 1839) 12

Bonet v. *Texas Co.*, 308 U.S. 463 (1940) 20, 23

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 5, 6, 16

Bradley v. *Richmond School Board*, 416 U.S. 696 (1974) 5, 6, 16, 17, 20, 21

Butler v. *Boarman*, 1 H. & McH. 371 (Md. 1770) 7

Cameron v. *United States*, 231 U.S. 710 (1914) 12

Carroll v. *Carroll's Lessee*, 57 U.S. (16 How.) 275 (1854) 11

Chelentis v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918) 22

Chew Heong v. *United States*, 112 U.S. 536 (1884) 11

Claridge Apartments Co. v. *Commissioner*, 323 U.S. 141, 164 (1944) 5

Page

Crane v. *Hahlo*, 258 U.S. 142 (1922) 22

Dash v. *Van Kleeck*, 7 Johns. 477 (N.Y. 1811) 6, 10, 13

Ex parte Collett, 337 U.S. 55 (1949) 20, 22

General Motors Corp. v. *Romein*, 112 S. Ct. 1105 (1992) 13, 15

Gillmore v. *Shooter*, 86 Eng. Rep. 1091, 2 Mod. Rep. 310 (1678) 7

Greene v. *United States*, 376 U.S. 149 (1964) 5, 20, 21, 22

Hallowell v. *Commons*, 239 U.S. 506 (1916) 20, 23

Hitchcock v. *Way*, 112 Eng. Rep. 360 (1837) 12

In re Richardson, 20 F. Cas. 699 (C.C.D. Mass. 1843) 12

Kaiser Aluminum & Chemical Corp. v. *Bonjorno*, 494 U.S. 827 (1990) 6, 15, 17

Ladiga v. *Roland*, 43 U.S. (2 How.) 581 (1844) 11

Litton Systems, Inc. v. *American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984) . . 9, 13, 14

Luddington v. *Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), *petition for cert. filed*, No. 92-977 (Dec. 3, 1992) 13, 16, 18, 27

McEwen v. *Den*, 65 U.S. (24 How.) 242 (1860) 11, 24

Page

Miller v. *United States*, 294 U.S. 435 (1935) 5

Murray v. *Gibson*, 56 U.S. (15 How.) 421 (1853) . . 11, 24

Osborne v. *Huger*, 1 Bay 179 (S.C. 1791) 7

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 3, 19, 26

PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 15

Prince v. *United States*, 19 F. Cas. 1331 (C.C.D. Mass. 1814) 10, 24

Railroad Co. v. *Grant*, 98 U.S. 398 (1879) 20, 23

Republic Nat. Bank of Miami v. *United States*, 113 S. Ct. 554 (1992) 17

Reynolds v. *M'Arthur*, 27 U.S. (2 Pet.) 417 (1829) . . . 11

Sampeyreac v. *United States*, 32 U.S. (7 Pet.) 222 (1833) 20, 22, 23

Shwab v. *Doyle*, 258 U.S. 529 (1922) 12

Sohn v. *Waterson*, 84 U.S. (17 Wall.) 596 (1873) 11, 24

Somerset v. *Dighton*, 12 Mass. 383 (1815) 12

Southwestern Coal Co. v. *McBride*, 185 U.S. 499 (1902) 12

Stephens v. *Cherokee Nation*, 174 U.S. 445 (1899) . . . 11

Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) 5, 6, 16, 24

Page

Twenty Per Cent Cases, 87 U.S. (20 Wall.) 179 (1873) 11

Union Pac. R.R. v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913) 12

United States v. *American Sugar Refining Co.*, 202 U.S. 563 (1906) 12

United States v. *Burke*, 112 S. Ct. 1867 (1992) 19, 26

United States v. *Heth*, 7 U.S. (3 Cranch) 399 (1806) 6, 9, 10

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160 (1928) 5, 6, 23

United States v. *Moore*, 95 U.S. 760 (1877) 11

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 6, 7, 8, 9, 11, 21

United States v. *Security Industrial Bank*, 459 U.S. 70 (1982) 11, 20, 21

United States v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1 (1926) 11, 24

U.S. Fidelity Co. v. *Struthers Wells Co.*, 209 U.S. 306 (1908) 12, 18, 23

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 15

Wallace v. *Adams*, 204 U.S. 415 (1907) 12

White v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982) 17

Page

White v. *United States*, 191 U.S. 545 (1903) 12

Witman v. *Hapgood*, 10 Mass. 437 (1813) 12

Statutes, Rules and Regulations

Civil Rights Act of 1964, Tit. VII,
42 U.S.C. § 2000e *et seq.* . . . . . *passim*

Civil Rights Act of 1991,
Pub. L. No. 102-106, 105 Stat. 1071 . . . . . *passim*

Crime Control Act of 1990, Pub. L. 101-647,
104 Stat. 4789 15

Customs and Trade Act of 1990, Pub. L. 101-382,
104 Stat. 629 15

Federal Deposit Insurance Corporation
Improvement Act of 1991,
Pub. L. 102-242, 105 Stat. 2236 15

Immigration Act of 1990, Pub. L. 101-649,
104 Stat. 4978 15

Independent Safety Board Act Amendments of 1990,
Pub. L. 101-641, 104 Stat. 4654 15

Inventions in Outer Space Act, Pub. L. 101-580,
104 Stat. 2863 15

Soldiers & Sailors Civil Relief Act of 1991,
Pub. L. 102-12, 105 Stat. 34 15

42 U.S.C. § 1981 . . . . . *passim*

Page

Constitutional Provisions

N.H. CONST., Pt. 1, Art. 23 13

COLO. CONST., Art. II, § 11 13

GA. CONST., Art. I, § I, ¶ X 13

MO. CONST., Art. I § 13 13

MONT. CONST., Art. XIII, § 1, cl. 3 13

OHIO CONST., Art. II, § 28 13

TENN. CONST., Art. I, § 20 13

TEX. CONST., Art. I, § 16 13

Miscellaneous

1 W. BLACKSTONE, COMMENTARIES ON THE
LAWS OF ENGLAND 13

Hochman, *The Supreme Court And The
Constitutionality Of Retroactive
Legislation*, 73 HARV. L. REV. 692 (1964) 14

Munzer, *A Theory of Retroactive Legislation*,
61 TEX. L. REV. 425 (1982) 14

Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) 14

Smead, *The Rule Against Retroactive Legislation
A Basic Principle of Jurisprudence*,
20 MINN. L. REV. 775 (1935) 6, 7, 13, 14

2 J. STORY, COMMENTARIES ON THE
CONSTITUTION OF THE UNITED STATES (1891) . . 12

Nos. 92-757 and 92-938

In the Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF, *Petitioner,*

v.

USI FILM PRODUCTS, ET AL., *Respondents.*

MAURICE RIVERS AND ROBERT C. DAVISON, *Petitioners,*

v.

ROADWAY EXPRESS, INC., *Respondent.*

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

---

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AND ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE AMICI CURIAE

The American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 for-hire motor carriers, as well as private carriers, leasing companies, and trucking suppliers. Nationwide, the trucking industry employs approximately 7,800,000 men and women. ATA regularly advocates the trucking industry's common interests before this Court and other courts.[1]

---

[1] The written consent of each of the parties to the filing of this brief has been filed with the Clerk.

The Association of American Railroads ("AAR"), a not-for-profit corporation, is a trade association of the nation's major railroads. AAR's members operate approximately 76 percent of line-haul mileage, produce approximately 91 percent of freight revenue, and employ approximately 90 percent of the railway work force in the United States, with nearly 225,000 employees. AAR represents its member railroads before courts, agencies and Congress in matters of common concern.

The issues at stake in this case are of direct concern to ATA and AAR. ATA and AAR, on behalf of the motor carrier and railroad industries, strongly support, and are deeply committed to, equality of employment opportunity for all persons and believe that discrimination in all forms should be eliminated from the workplace. ATA and AAR thus share the general goals of Congress in enacting the Civil Rights Act of 1991 to the extent that the new provisions will serve to reduce or eliminate future employment discrimination.

At the same time, however, the membership of ATA and AAR, as employers of many millions of workers, have a large stake in ensuring that the provisions of the new Act be applied fairly and with a minimum of disruption to cases arising prior to the Act. In the absence of congressional direction to apply the new Act retroactively, fair application requires that employers' legitimate reliance under the previously existing statutory scheme be recognized and that their potential liability and financial exposure for conduct pre-dating the Act not be increased through retroactive application of the Act to pre-Act conduct. Fair application also requires that trials commenced or concluded under the then-existing law not be reopened and relitigated based on retroactive application of the Act's new statutory requirements. For these reasons, ATA and AAR have a strong interest in seeing that the new Act is applied prospectively only to conduct occurring after its effective date.

STATEMENT

1. Petitioner Barbara Landgraf (No. 92-757) worked for respondent USI Film Products from September 1984 to January 1986. During that time she was subjected to "inappropriate verbal comments and physical contact" by a co-worker.

Pet. App. A-2. After she reported that harassment, the co-worker was given a written reprimand and assigned to a different department. At the same time, the company counseled Landgraf regarding problems she was having getting along with other co-workers. Two work days later, Landgraf quit her job, leaving behind a letter to her co-workers stating that "the stress that each one of you help to put on me, caused me to leave my job." *Id.* at A-3.

Landgraf brought this lawsuit on July 21, 1989, claiming that the harassment created a "hostile work environment" at USI and that she had been constructively discharged in violation of Title VII. Following a bench trial, the district court issued its decision on May 22, 1991, holding that Landgraf had not been constructively discharged because the harassment was not severe enough that a reasonable person would have felt compelled to resign. Pet. App. B-3. The court also concluded that "[t]he remedial measures instituted by [USI] alleviated the harassment" and that "Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers." *Id.* at B-2.

Landgraf appealed, arguing that the district court erred in holding that she had not been constructively discharged and that USI had acted reasonably to stop the harassment. On November 21, 1991 -- nearly six years after Landgraf left USI and six months after the district court ruled against her -- Congress enacted the Civil Rights Act of 1991. Landgraf argued that the new law, which for the first time provided a cause of action for compensatory and punitive damages under Title VII, should be applied retroactively to her claim. The court of appeals disagreed, holding that the Act was not to be applied retroactively and affirming the district court's judgment in all other respects. Pet. App. A-8 to A-10.

2. On September 26, 1986, petitioners Maurice Rivers and Robert Davison (No. 92-938) and a co-worker, James Harvis, were discharged from their employment with respondent Roadway Express, Inc., for refusing to attend a disciplinary hearing and for poor work records. They filed suit under 42 U.S.C. § 1981 and Title VII, claiming that their discharges were racially motivated and were also in retaliation for previ-

ously filing a grievance against Roadway. Harvis's case was tried separately to a jury, which reached a verdict in favor of Roadway. The district court dismissed Rivers' and Davison's Section 1981 claims in light of this Court's holding in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), that Section 1981 does not provide a cause of action for discriminatory discharge or breach of contract. Following a bench trial, on October 18, 1990, the district court entered judgment in favor of Roadway on the Title VII claims, holding that Rivers and Davison had failed to prove that Roadway's actions were racially motivated. Pet. App. 2a-4a.

Rivers and Davison appealed the dismissal of their Section 1981 claims. Once again, the 1991 Act came into the picture during the pendency of the appeal, five years after petitioners' discharge and over a year after the district court's judgment against them. The Act expanded the coverage of Section 1981 to provide a cause of action for discriminatory discharge, and petitioners argued that it should be applied retroactively to revive their claims. Although the court of appeals rejected that argument, it held that even before the 1991 Act, Section 1981 provided a cause of action for petitioners' retaliatory discharge claim. The court of appeals therefore reversed the district court and remanded for further proceedings on the Section 1981 retaliation claim. Pet. App. 14a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented is whether the Civil Rights Act of 1991 should be applied retroactively to conduct occurring before the date of enactment. Unless the Court holds that Congress expressly made the law nonretroactive -- an approach that has strong support in the legislative history -- the issue is how courts should decide whether legislation should be given retroactive effect in the absence of any express direction by Congress. In deciding this issue, the Court is not on unfamiliar ground. For over 200 years this Court has recognized that retrospective laws are unjust and that Congress does not generally make its laws retroactive. In light of that recognition, the Court has followed the rule that a law should not be regarded as retroactive unless it expressly provides for retroactive application or is incapable of any other interpretation.

The Court has applied the presumption against retroactivity to "remedial" statutes, and has certainly not made the unmanageable distinction petitioners and their *amici* attempt to draw between "substantive," "procedural," and "remedial" laws. The critical inquiry is not what label to attach to a particular statute, but whether applying the new law to the pending case would change the consequences of past conduct.

It is arguable that the Court deviated from the presumption against retroactivity on two occasions, *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), and *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The perception that *Thorpe* and *Bradley* applied a presumption *in favor of* retroactivity has caused great and needless confusion in the lower courts and among litigants. The Court should end that confusion and confirm the continued vitality of the longstanding rule that a statute cannot be given retrospective effect absent an affirmative statement in the law -- passed by Congress and signed by the President -- that the law should be applied retroactively.

ARGUMENT

I. THE RULE THAT STATUTES NOT BE GIVEN RETROACTIVE EFFECT UNLESS CONGRESS EXPRESSLY PROVIDES FOR SUCH AN EFFECT HAS BEEN CONSISTENTLY APPLIED BY THIS COURT FOR NEARLY 200 YEARS AND IS BASED ON SOUND PUBLIC POLICIES.

For nearly 200 years, this Court strictly applied a rule of statutory construction that acts of Congress are not to be applied retroactively unless they expressly provide for retrospective application or are susceptible to no other reasonable construction. The Court restated the rule recently in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988):

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E.g.*, *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944); *Miller* v. *United States*, 294 U.S. 435, 439 (1935);

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928).

American courts consistently applied this rule even before *Magnolia Petroleum*. See, *e.g.*, *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); *Dash* v. *Van Kleeck*, 7 Johns. 477, 502 (N.Y. 1811) (Kent, C.J.) ("A statute ought never to receive such a construction [of retroactive application] if it be susceptible of any other"). Even earlier, the strict presumption against retroactivity was a fixture of the English common law and can be traced to ancient Greek and Roman legal traditions. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775-780 (1935).

Some view two recent decisions of this Court as deviating from this ancient rule. In *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1968), the Court said that "an appellate court must apply the law in effect at the time." And in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 715 (1974), the Court purported to "reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Both *Thorpe* and *Bradley* based their conclusions on Chief Justice Marshall's opinion in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Petitioners and their supporting *amici* -- particularly the United States -- characterize the tension between *Bradley* and *Thorpe* on the one hand, and the traditional rule articulated in *Bowen* on the other hand, as "more apparent than real." U.S. Br. at 17. They regard the traditional rule as applying only to "substantive provisions" of new laws, and the *Bradley/Thorpe* rule as applying to "procedural and remedial provisions" of such laws. Their explanation is historically inaccurate, and the distinction they would draw is ill-advised and unworkable. *Bradley* and *Thorpe* can be reconciled with the traditional rule,

but not in the way petitioners suggest. Both of those cases can be viewed as purely prospective application of new laws. But there would be nothing prospective about applying the Civil Rights Act of 1991 in the way advocated by petitioners, and the policy concerns that for centuries have sustained the presumption against retroactivity remain as powerful today and apply fully to this case.

A. For Nearly 200 Years, This Court Has Consistently Applied The Presumption That New Statutes Are Not Retroactive.

The Court's opinion in *Schooner Peggy* gives no indication that it was departing from centuries of settled law, and it was not. By 1801 it was well established that while the legislature could give retrospective effect to civil laws, the courts would not construe laws to have retrospective effect unless the legislature expressly provided for such an effect:

> The [Roman] Digest showed that the Prince could make a law operate retrospectively if he made it expressly clear that such was his will, and the common law followed this interpretation of the rule. Thus, the principle in the English common law meant that the courts, in the exercise of their function of interpreting the law in the cases which came before them, viewed themselves as bound by the rule of construction that no law should be given an operation from a time prior to its enactment unless Parliament has expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to this past time. Because a retroactive law was unjust the judges insisted that they would not assume that Parliament meant a statute in general terms to be applied retroactively.

Smead, 20 MINN. L. REV. at 778. When he wrote the Court's opinion in *Schooner Peggy*, Chief Justice Marshall was undoubtedly aware of this rule, which was regularly applied by the American and English courts. See, *e.g.*, *Osborne* v. *Huger*, 1 Bay 179, 198 (S.C. 1791); *Butler* v. *Boarman*, 1 H. & McH. 371, 382 (Md. 1770); *Gillmore* v. *Shooter*, 86 Eng. Rep. 1091, 2 Mod. Rep. 310 (1678).

Schooner Peggy recognized the presumption against retroactivity, but held that a new treaty was expressly retroactive. The case involved the condemnation of a French ship that had been captured by an American vessel in April 1800. The lower courts upheld the condemnation of the ship, but in 1801, while the case was pending in the Court, France and the United States entered into a treaty which provided that "[p]roperty captured, and not yet *definitively* condemned * * * shall be mutually restored." 5 U.S. (1 Cranch) at 107. The case required the Court to construe the terms of that treaty, and particularly to decide what it meant to be "definitively condemned". The Court held that the treaty was expressly retroactive, reasoning that "[o]n any other construction the word *definitive* would be rendered useless and inoperative." 5 U.S. (1 Cranch) at 109.

The meaning of the Court can be seen from the entire paragraph addressing the issue:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such 10a case the court must decide according to existing laws, and if it be necessary to set aside a judgment,

> rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

5 U.S. (1 Cranch) at 110. In sum, *Schooner Peggy* involved a straightforward construction of the 1801 treaty. The Court acknowledged the general rule against construing a statute to have retrospective effect, but the plain language of the treaty ("its manifest import") required such a construction.

The Court acknowledged the general rule "that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not." 5 U.S. (1 Cranch) at 110. More to the point, it emphasized that in "private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Ibid.* But because the treaty with France expressly applied to pending (but not yet "definitive") condemnation cases, the law must "receive a construction conforming to its manifest import." *Ibid.*

The Court's statement that if "a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied" must be taken in the context of the full passage. As Judge Newman has persuasively explained, "'obey[ing]' the intervening statute did not necessarily mean applying it to the pending case; instead the statute must be construed, and, if only private rights were involved, a retroactive construction was not favored." *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 746 F.2d 168, 172 (2d Cir. 1984). The longstanding rule -- recited by Chief Justice Marshall in his opinion -- that retroactive application of new laws to pending cases should be "struggle[d] hard against" is thus not inconsistent with his statement in the same paragraph that the new law be "obeyed."

That *Schooner Peggy* did not reverse the presumption against retroactive application of new laws is clearly seen from contemporaneous decisions. Justice Paterson's opinion in *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) is instructive:

> Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and

> imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

In *Heth*, the Court held that a law limiting the commissions paid to customs collectors did not apply to goods imported before the effective date of the law.

Chief Judge Kent, in 1811, applied the rule and noted its ancient origins:

> A statute ought never to receive [a retrospective] construction, if it be susceptible of any other, and the statute before us can have a reasonable object and full operation without it. * * * It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. * * * It is, indeed, admitted [by Roman law], that the prince may enact a retrospective law, provided it be done *expressly*.

Dash v. *Van Kleeck*, 7 Johns. 477, 502, 503, 505 (N.Y. 1811) (emphasis in original). The case was a lawsuit against a sheriff who allowed a man held in prison for indebtedness to escape. A statute passed before the trial (but after the escape) would have given the sheriff an absolute defense, but the Court held that it would not be applied retroactively.

Justice Story stated the rule while sitting on circuit in 1814:

> It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended. "Nova constitutio futuris formam imponere debet, et non preterites." Bract. lib. 4, fol. 228; 2 Inst. 292. And this maxim applies as well to remedial, as to other statutes. There is nothing in the wording of this Act, which points to a retrospective operation, and the whole intent may be satisfied by restraining it to future cases.

Prince v. *United States*, 19 F. Cas. 1331, 1332 (C.C.D. Mass. 1814). *Prince* involved the duties to be assessed upon goods captured from enemy ships. At the time of their capture, such goods were subject to the same duty as like goods brought into

the country through ordinary channels. While the case was pending, a new law reduced the duty on prize goods by one-third, but the court held that in the absence of express language to that effect, the new law was not retroactive.

This Court recognized the presumption against retroactive legislation throughout the 19th century and never regarded *Schooner Peggy* as stating a different rule.[2] See, *e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899) ("the general rule is that statutes should be so construed as to give them only prospective operation"); *Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884) (it is "the settled doctrine of this Court" that "words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); *United States* v. *Moore*, 95 U.S. 760, 762 (1877) ("A statute is never to be construed to have [retroactive] effect, if it can be reasonably avoided. The presumption, until rebutted, is the other way."); *Twenty Per Cent Cases*, 87 U.S. (20 Wall.) 179, 187 (1873); *Sohn* v. *Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873); *McEwen* v. *Den*, 65 U.S. (24 How.) 242, 244 (1860); *Carroll* v. *Carroll's Lessee*, 57 U.S. (16 How.) 275, 281 (1854); *Murray* v. *Gibson*, 56 U.S. (15 How.) 421, 423 (1853); *Ladiga* v. *Roland*, 43 U.S. (2 How.) 581, 589 (1844); *Reynolds* v. *M'Arthur*, 27 U.S. (2 Pet.) 417, 435 (1829) (Marshall, C.J.) ("[A retrospective] construction can never be admitted by the Court unless it be rendered indispensable by the language of the act.").[3]

---

[2] It is noteworthy that in an 1854 case, *Schooner Peggy* was cited by an advocate before the Court for the proposition that "[s]tatutes are not to be construed to have a retrospective operation." *Carroll* v. *Carroll's Lessee*, 57 U.S. (16 How.) 275, 279 (1854). See also *United States* v. *Security Industrial Bank*, 459 U.S. 70, 80 (1982) (opinion for the Court citing *Schooner Peggy* for the rule against retroactive construction).

[3] See also *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) ("That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is

B. The Traditional Rule Is Based On Sound Public Policies.

The presumption that legislation is not retroactive unless the legislature expressly so provides is a bright-line rule that makes it relatively easy for courts to decide cases like this one, lets potential litigants determine the law without litigation, and makes it clear to legislators that if they intend to take the unusual step of making a law retroactive, they must clearly say so. But the virtues of the rule go far beyond those. The rule reflects a longstanding and intuitively correct belief that retroactive laws can be unfair and at the very least require special justification. The rule promotes finality in litigation. In addition, the rule accurately predicts legislative intent: relatively few laws are intended to have retrospective effect, so a presumption against retroactivity is more likely to further legislative intent than the contrary presumption. There is much to commend the presumption against retroactivity, and virtually nothing to commend a contrary rule.

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (1891). As this Court put it more recently, "[r]etroactive legislation presents problems of unfairness that

---

a rule of general application"); *Shwab* v. *Doyle*, 258 U.S. 529, 534-535 (1922); *Cameron* v. *United States*, 231 U.S. 710, 720 (1914); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314 (1908); *Wallace* v. *Adams*, 204 U.S. 415, 421-422 (1907); *United States* v. *American Sugar Refining Co.*, 202 U.S. 563, 577 (1906); *White* v. *United States*, 191 U.S. 545, 552 (1903); *Southwestern Coal Co.* v. *McBride*, 185 U.S. 499, 503-504 (1902). State, lower federal, and English courts also consistently applied the rule. See, *e.g.*, *Baugher* v. *Nelson*, 9 Gill 299, 303 (Md. 1850); *Bedford* v. *Shilling*, 4 Serg. & Rawl. 401, 402-403 (Pa. 1818); *Somerset* v. *Dighton*, 12 Mass. 383, 385 (1815); *Witman* v. *Hapgood*, 10 Mass. 437, 439 (1813); *In re Richardson*, 20 F. Cas. 699, 702-703 (C.C.D. Mass. 1843) (Story, J.); *Blanchard* v. *Sprague*, 3 F. Cas. 648, 650 (C.C.D. Mass. 1839) (Story, J.); *Hitchcock* v. *Way*, 112 Eng. Rep. 360, 363-364 (1837).

are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992). The unfairness of retroactive laws was recognized by the Greeks and Romans (see Smead, 20 MINN. L. REV. at 775-776) and is reflected in the constitutions of several states. *E.g.*, N.H. CONST., Pt. 1, Art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."). See also COLO. CONST., Art. II, § 11; GA. CONST., Art. I, § I, ¶ X; MO. CONST., Art. I § 13; MONT. CONST., Art. XIII, § 1, cl. 3; OHIO CONST., Art. II, § 28; TENN. CONST., Art. I, § 20; TEX. CONST., Art. I, § 16. Retroactive legislation is seen as contrary to "the rule of law" and akin to the practices of the most despotic rulers of concealing or changing the law to trap their enemies. Smead, 20 MINN. L. REV. at 776-780; 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *45; *Luddington* v. *Indiana Bell Telephone Co.*, 966 F.2d 225, 227-228 (7th Cir. 1992) (Posner, J.), *petition for cert. filed*, No. 92-377 (Dec. 3, 1992); *Dash* v. *Van Kleeck*, 7 Johns. at 503-504.

In addition to disrupting settled expectations and interfering with closed transactions, retroactive laws can destroy the finality of litigation and waste judicial resources. As explained by Judge Posner in refusing to apply the 1991 Act to pending cases, "[r]etroactive application across the board would produce massive dislocations in ongoing litigation and defeat substantial reliance interests of employers." *Luddington*, 966 F.2d at 229. Retroactivity effectively allows courts to alter the "rules of the game" after the trial already is over and the parties' respective positions are fixed in reliance on prior law. See *Litton Systems*, 746 F.2d at 171 ("[n]o party to an appeal should be held to a standard that permits consideration of an intervening statute only when issues affected by the statute are already on ap

peal").[4] Indeed, protecting the ability to plan one's affairs in accordance with existing law lies at the heart of this Court's retroactivity jurisprudence. *Bennett* v. *New Jersey*, 470 U.S. 632 (1985). Smead, 20 MINN. L. REV. at 777.

If retroactivity is the rule, cases correctly resolved will need to be re-tried. Trial losers will pursue weak appeals and keep cases alive as long as possible whenever legislation is being considered that could change the result. Similarly-situated individuals will have their claims resolved differently, with bonuses for those who appeal their cases (or keep their appeals alive longer) and those who bring lawsuits in the face of adverse law. *Litton*, 746 F.2d at 171 ("[s]uch a standard would require either anticipation of statutes not yet enacted or the assertion of frivolous grounds in appeals and cross-appeals in the hope that a new statute might affect their resolution favorably"). In short, the incentives created by retroactive laws (or the possibility of retroactive laws) are all wrong for the legal system, and are manifestly disruptive to individuals who need to put contentious lawsuits behind them and get on with their lives. See Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 427 (1982) ("[r]etroactive laws frustrate the central purpose of law by disrupting expectations and actions taken in reliance on them. This disruption is always costly and rarely defensible. . . . [R]etroactive laws, at least those that alter the legal status of a pre-enactment action or event, are very hard to justify").

Retroactive application of laws can also lead to highly artificial, fragmentary decisionmaking on appeal. Litigants decide what factual issues to pursue (or to contest) based on the

---

[4] See also Hochman, *The Supreme Court And The Constitutionality Of Retroactive Legislation*, 73 HARV. L. REV. 692 (1964) ("[p]erhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences"); Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) ("[a] retroactive law makes it difficult or impossible to act with knowledge of the applicable law. This explains why retroactive laws are generally objectionable: We feel that a person is morally entitled to know in advance what legal character and consequences his acts have").

legal consequences they believe those factual issues have at the time. Retroactive application of new laws may give legal consequence to factual findings that the parties did not seriously contest and that are not worthy of such consequences, and may require appellate courts to apply factual findings in a legal context that is totally divorced from that which gave rise to those findings in the first place.

Besides reflecting the proper hostility toward retroactive laws, the presumption that legislation is not retroactive has virtues of its own. As Justice Scalia put it, "[a] background rule of retroactivity is * * * patently contrary to probable legislative intent." *Kaiser Aluminum*, 494 U.S. at 856. Most statutes are *not* retroactive. Congress certainly knows how to make laws retroactive (see, *e.g.*, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236; Soldiers & Sailors Civil Relief Act of 1991, Pub. L. 102-12, 105 Stat. 34; Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978; Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789; Independent Safety Board Act Amendments of 1990, Pub. L. 101-641, 104 Stat. 4654; Inventions in Outer Space Act, Pub. L. 101-580, 104 Stat. 2863; Customs and Trade Act of 1990, 104 Stat. 629) yet it rarely does so. By our count, of the 429 substantive Acts of Congress passed during 1990 and 1991 (the years in which the Civil Rights Act was drafted), only the seven listed above were expressly retroactive.[5] In those years, a presumption against retroactivity would thus seem accurately to predict congressional intent over 98% of the time. Obviously, the presumption against retroactivity more accurately predicts legislative intent than would a contrary presumption.

In addition, this Court has held that because retroactive legislation poses special risks of unfairness, the retroactive aspects of laws must separately meet the test of due process. *Romein*, 112 S. Ct. at 1112; *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery* v. *Turner Elkhorn Mining Co.*,

---

[5] This count excludes ceremonial, housekeeping, budgetary and technical correction statutes.

428 U.S. 1, 16-17 (1976). The "retroactive application of the legislation [must] itself [be] justified by a rational legislative purpose." *R.A. Gray*, 467 U.S. at 730. It would be difficult indeed to assess the legislative purpose behind the retroactive application of a law when that application was not considered or expressly required by the legislature. The traditional rule requiring an expression of legislative intent before a law will be applied retroactively at the very least increases the possibility that a court will be able to identify the rational legislative purpose for retroactive application.

Finally, application of a rule that laws will be given retroactive effect only if Congress says so will have the salutary effect of diminishing litigation over the degree of reliance placed on prior law by a given defendant. See *Luddington*, 966 F.2d at 229 ("[r]etroactive application carefully tailored to situations * * * in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary").

C. *Bradley* and *Thorpe* Need Not Be Viewed As Deviating From The Traditional Rule.

The conventional wisdom appears to be that *Thorpe* and *Bradley* sharply deviated from the presumption against retroactivity, and that in *Bowen* the Court returned to the presumption and ignored *Thorpe* and *Bradley* thus creating a "tension" that this Court must resolve. There is certainly dicta in *Thorpe* and *Bradley* that seems contrary to the traditional rule. But both cases can be viewed as applying new law prospectively to their particular circumstances.

Thorpe involved a public housing tenant who had been served with an eviction notice one day after being elected president of a tenants' organization. The Housing Authority did not tell her why she was being evicted. She resisted the eviction, claiming it was in retaliation for the exercise of her First Amendment rights, and while the case was pending a new regulation went into effect requiring that tenants be notified of the reasons for their eviction. The Court held that the new regulation applied and that the petitioner could not be evicted without the required notice of reasons. The critical fact in

Thorpe was that the petitioner had not yet been evicted when the new regulation went into effect:

> [The Housing Authority] refuses to apply [the regulation] to petitioner simply because it decided to evict her before the circular was issued. Since petitioner has not yet vacated, we fail to see the significance of this distinction. We conclude, therefore, that the [regulation] should be applied to all tenants still residing in McDougald Terrace, including petitioner * * *.

393 U.S. at 283. If the Court had applied the regulation to previously-evicted tenants, that would have been retroactive. But applying it to tenants still residing in the housing project was not retroactive. The event governed by the new regulation -- the eviction -- had not yet occurred. See *Republic Nat. Bank of Miami* v. *United States*, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring) ("not every application of a new statute to a pending case will produce a 'retroactive effect.' '[W]hether a particular application *is* retroactive' will 'depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated.'") (citation omitted) (emphasis in original).

Bradley involved a petition for attorney's fees and costs in a school desegregation case. The district court awarded fees and costs to the prevailing plaintiffs, but the court of appeals reversed. While the appeal was pending, Congress passed a new law that made it clear that fee awards were authorized in such cases, and this Court held that the law applied to the pending case. Of course, it has long been recognized that fee petitions raise issues that are collateral to the underlying litigation. *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982). Thus, in Justice Scalia's words, "[i]t is at least arguable that it does not constitute retroactive application to apply a provision dealing with the award of costs or fees in litigation to all litigation that has not yet terminated when the provision takes effect." *Kaiser Aluminum*, 494 U.S. at 849.

II. THE PRESUMPTION AGAINST RETROACTIVITY FULLY APPLIES TO THE CIVIL RIGHTS ACT OF 1991.

We have shown above that this Court has consistently applied the presumption that statutes do not apply retroactively. Petitioners and their *amici* contend, however, that the presumption governs only when a new statute makes "substantive" changes in the law, and a presumption in favor of retroactivity governs when a new law makes "procedural" or "remedial" changes. This contention is plainly wrong: the Court has repeatedly applied the rule against retroactivity to laws that were "procedural" or "remedial." In any event, such a distinction would not benefit petitioners here, because the changes wrought by the Civil Rights Act of 1991 are "substantive" in every meaningful sense of that term.

It may be that most procedural changes are unlikely to have any retroactive effect (*i.e.*, to change the consequences of prior conduct) and may routinely be applied to pending cases. See, *e.g.*, *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 315 (1908). As Judge Posner put it, "[p]rocedural innovations not likely to bias decision systematically in favor of one litigant rather than his opponent can, without serious affront to the values crystallized in the phrase 'rule of law,' be applied to cases pending when the innovations were adopted." *Luddington*, 966 F.2d at 228. Application of such changes to pending cases have only prospective effects. But the changes made by the Civil Rights Act of 1991 at issue in this case would change the legal consequences of prior conduct and would therefore affect the rights and liabilities of the parties; application of the Act to pending cases would thus be retroactive and improper.[6]

---

[6] The only provision of the Act at issue in this case that might be viewed as procedural is the right to a jury trial under Section 102. However, under the 1991 Act a jury trial is available only if the complaining party seeks compensatory or punitive damages under Section 102. If the new Act's cause of action for compensatory and punitive damages is not applied retroactively -- and it should not be -- retroactive application of the jury trial provision will never arise as a separate issue.

Relying primarily on decisions of this Court that use the term "remedial" in a very different sense, petitioners and their *amici* argue that the critical provisions of the Act are merely "remedial," and not "substantive," because they do not "make[ ] illegal conduct that formerly was legal" (U.S. Br. at 21) and because they provide "additional remed[ies] for intentional misconduct that was illegal under Title VII before the effective date of the 1991 Act." *Id.* at 22. Under this theory, the Act's new causes of action for compensatory and punitive damages and its significant expansion of the scope of the actions covered by Section 1981 are not "substantive," do not affect the rights and liabilities of parties, and therefore can be applied retroactively.

It does not make sense to rely on labels like "procedural," "remedial," and "substantive" in deciding whether a new law should be applied to pending litigation. But even if those labels were significant, the notion that Section 102's newly-added cause of action under Title VII for compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and * * * punitive damages" is not substantive and does not affect the rights and liabilities of the parties borders on the absurd. See *United States* v. *Burke*, 112 S. Ct. 1867, 1874 n.12 (1992).

Equally untenable is the claim that no substantive rights or liabilities are involved in expanding the scope of Section 1981 to include not only the making and enforcement of contracts, but also the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Section 101. The fact that in some cases the conduct now prohibited by Section 1981 was already prohibited by Title VII hardly means that the expansion of Section 1981 does not affect the rights and liabilities of parties to Section 1981 suits -- if it did not, why would the law have been changed, why would the debate over *Patterson* have been so heated, and why would this issue have been raised in litigation?

A. *Bennett* Does Not Support A Presumption In Favor Of Retroactivity.

Petitioners claim that the distinction between "substantive" and "remedial" changes is supported by this Court's decision in *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), and that "*Bennett* is consistent with a long line of decisions of this Court applying new statutory provisions that are procedural or remedial in nature in pending litigation." U.S. Br. at 20, citing *Ex parte Collett*, 337 U.S. 55, 71 (1949); *Bonet* v. *Texas Co.*, 308 U.S. 463, 467 (1940); *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); and *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833). On close examination, neither *Bennett* nor the "long line of decisions" supports petitioners' distinction.

Bennett involved the use of federal funds provided to the State of New Jersey under Title I of the Elementary and Secondary Education Act of 1965. New Jersey had allocated some of the funds to ineligible schools in Newark in 1970-1972, and the U.S. Department of Education sought to recover those funds. The state argued -- and the Third Circuit held -- that a 1978 amendment to Title I that gave the states more leeway in allocating funds applied retroactively, citing *Bradley*. This Court reversed, holding that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639.

The Court cited two cases in support of its holding: *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982), and *Greene* v. *United States*, 376 U.S. 149, 160 (1964). *Security Industrial Bank* held that a change in the bankruptcy laws that allowed individuals to avoid liens on their household furnishings was not to be applied retroactively:

> The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This Court has often pointed out [that] "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such construction if it is susceptible to any other."

459 U.S. at 79-80 (citations omitted). Although the Court cited *Schooner Peggy* in support of the rule against retroactive construction (*id.* at 80), it did not mention *Bradley*.

Greene v. *United States* involved an employee of a military contractor who was fired when the Department of the Navy revoked his security clearance. He challenged the revocation and obtained a favorable judgment in 1959. He then filed a claim for his loss of earnings pursuant to a 1955 regulation. In 1960, while his claim was pending, the Defense Department issued a new regulation changing the rules regarding monetary restitution. The Court once again recited the rule against construing a law to have retrospective effect, and held that the 1960 regulation was not applicable.

Bennett, *Security Industrial Bank*, and *Greene* lend absolutely no support to the claim that statutes which do not make illegal conduct that formerly was legal should be presumed to apply retroactively. To the contrary, *Bennett* held that whenever a new law "*affect[s]* substantive rights and liabilities," it is to be "presumed to have only prospective effect." 470 U.S. at 639 (emphasis added). Petitioners' reasoning -- that a new law is regarded as "substantive" and given prospective effect only when retroactive application would unfairly penalize conduct that was legal when it was performed -- cannot explain the outcome of *Bennett*, in which the new law made *legal* conduct that was previously *illegal*. Nor does the decision sustain the far-fetched notion that a law that provides a cause of action for compensatory and punitive damages where none existed does not affect the liabilities of defendants.

Security Industrial Bank and *Greene* also contradict petitioners' argument. The statute at issue in *Security Industrial*

Bank -- one that allowed individual debtors to retain their household furnishings -- can certainly be characterized as going to the remedies available in bankruptcy proceedings, but the Court nevertheless applied the presumption *against* retroactivity. *Greene* involved a procedural regulation, yet it too carried the presumption of prospectivity. In all three of these cases, the law at issue -- like the Civil Rights Act of 1991 -- affected the rights and liabilities of the parties with regard to past events, and were presumed prospective without regard to such labels as "remedial," "procedural," and "substantive."

B. Prior Decisions Of This Court Do Not Support Petitioners' Distinction.

Ex parte Collett demonstrates with particular clarity the flaw in petitioners' argument that "remedial" laws are presumed to have retroactive effect. The issue in *Collett* was whether the recently enacted 28 U.S.C. § 1404(a), allowing a district court to transfer a civil action to another district on *forum non conveniens* grounds, applied to pending actions. The Court held that it did apply:

> Clearly, § 1404(a) is a remedial provision applicable to pending actions. And "No one has a vested right in any given mode of procedure . . . ."

337 U.S. at 71 (citation omitted).[7] The use of the term "remedial" to refer to a change in venue law is a very different usage than the one petitioners urge upon the Court.

Collett, Sampeyreac, and many other cases use the term "remedial" as pertaining to the "means employed to enforce a right or redress an injury." *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918). As is clear from the passage from *Collett*, in this sense "remedial" is very much like "procedural," and does not at all refer to the amount of money one can

---

[7] The omitted citation is to *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922), which held that a retroactive change in state procedural rules did not violate the Due Process Clause. That issue -- and not the one involved in this case -- was decided in *Sampeyreac*, which held that an expressly retroactive law was not invalid. 32 U.S. (7 Pet.) at 238-239.

recover for the violation of a right or to the kinds of injuries (*e.g.*, emotional pain and suffering) for which compensation may be available.[8]

This Court has long applied the presumption against retroactivity to new laws that can be characterized as "procedural" or as "remedial" in petitioners' sense of that term. For example, in *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306 (1908), the Court applied the presumption to an amendment to a federal statute governing the procedures by which subcontractors and "material-men" on government building projects could bring an action for payment against the primary contractor. At first blush, the amendment seemed purely procedural -- it required the subcontractor to wait until after the project was completed to bring suit, and then to stand in line behind the government to collect under the terms of the contractor's performance bond. But because the amount that the subcontractor could recover would depend on what was left after the government took its due (the remainder would "be distributed *pro rata* among" the subcontractors), the Court held that it was presumed to be prospective only. 209 U.S. at 314-316. Of course if the rule were that any new law affecting the amount a party could recover was "remedial" and therefore presumed retroactive, the case would have come out the other way.

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160 (1928), held that a remedial change in the tax laws was not retroactive. The Revenue Act of 1924 required the government to include interest from the date of collection when it refunded taxes illegally or erroneously collected; previously the interest commenced six months after the taxpayer filed a refund claim. The Court held that the statute was not to be given retroactive

---

[8] The other cases cited in support of the petitioners' interpretation of *Bennett* are equally unavailing. As mentioned earlier (*supra* note 8), *Sampeyreac* involved the very different issue of whether an expressly retroactive law violates due process. *Hallowell* v. *Commons* and *Railroad Co.* v. *Grant* held that when Congress removes jurisdiction over certain matters from a court, pending litigation cannot continue. And *Bonet* v. *Texas Co.* merely recites a holding of the Supreme Court of Puerto Rico under local law relating to a purely procedural change.

effect "unless the legislative purpose so to do plainly appears." 276 U.S. at 162-163. Again under petitioners' rule the case would have been decided differently, because it "merely" related to the amount of money the taxpayer was entitled to collect as a result of the already-illegal taxation. See also *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) (the presumption that statutes are not retroactive "has been applied by this Court to statutes governing procedure * * * and specifically to the limitations of actions,"); *Sohn* v. *Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873) (statute of limitations); *McEwen* v. *Den*, 65 U.S. (24 How.) 242, 244 (1860) (procedures for registering conveyances); *Murray* v. *Gibson*, 56 U.S. (15 How.) 421, 423 (1853) (time period for enforcement of out-of-state judgments); *Prince* v. *United States*, 19 F. Cas. 1331, 1332 (C.C.D. Mass. 1814) (Story, J.) (emphasis added) (statute reducing duty on prize goods; "It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended. * * * *And this maxim applies as well to remedial, as to other statutes.*").

C. The Presumption Against Retroactivity Precludes Application Of A New Law That Would Change The Consequences Of Prior Conduct.

As the decisions discussed above demonstrate, in deciding whether the presumption against retroactivity precludes the application of a new law to a pending case, the determinative issue should not be whether the law can be pigeonholed as "procedural," "remedial," or "substantive," but instead whether application of the new law would change the consequences of past conduct (and thus be retroactive), or would merely govern future conduct or relationships (in which case the application would be prospective). In the former case the presumption applies, while in the latter it does not because application of the new law to the pending case would not have retroactive effect.

Thorpe is a perfect illustration of the latter situation. Application of the new regulation to the case simply meant that the Housing Authority would have to give existing tenants notice of the reasons for eviction before they could be forced from their homes. The Court did not rule that the regulation

applied to tenants who had already been forced out of their apartments; that reading of the regulation would have been retroactive, and the presumption against retroactivity would apply. To give another example, a change in the Federal Rules of Civil Procedure requiring parties to turn over relevant documents within a short time after litigation commences would be immediately applicable to lawsuits over past conduct, because application of the new rule would regulate the future conduct of the litigation and would not regulate or retroactively penalize the past conduct that gave rise to the lawsuit. But if the new rule enhanced the penalties for discovery abuse, it would not apply to abuse that occurred before its effective date.

Thus, the critical inquiry is not whether the presumption against retroactive application of new laws applies equally to a particular kind of law. This Court's decisions demonstrate that it applies to all laws. The inquiry is whether application of the new law to the pending case would truly have retroactive effect -- whether it would change the consequences of past conduct.

D. The Far-Reaching Provisions of the 1991 Civil Rights Act Should Not Be Applied Retroactively.

The Civil Rights Act of 1991 greatly expanded the federal discrimination laws, and application of the Act to these cases would clearly change the consequences of past conduct. Among other things, the Act expanded the scope of 42 U.S.C. § 1981. Section 101. For the first time, it gave plaintiffs claiming intentional employment discrimination a cause of action for compensatory and punitive damages, to be tried before a jury. Section 102. It modified the legal standards governing disparate impact claims (Section 105), prohibited the discriminatory adjustment of test scores (Section 106), and authorized payment of expert witness fees as part of attorneys' fees. Section 113. The Act also expanded the scope of Title VII to cover U.S. citizens working abroad for U.S. companies (Section 109) and gave new protection against employment discrimination to federal employees. Section 117, Title III.

This Court recently recognized the far-reaching effects of the Act, and indicated that the Act fundamentally changed the nature of the injuries that are compensable under Title VII:

> Respondents contend that Congress' recent expansion of Title VII's remedial scope supports their argument that Title VII claims are inherently tort-like in nature. Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages. Unlike respondents, however, we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit.

United States v. *Burke*, 112 S. Ct. 1867, 1874 n.12 (1992) (citations omitted).

Although petitioners raise claims under only two sections of the Act (Sections 101 and 102), the breadth and importance of the entire statute counsel strongly against retrospective application. Moreover, the two sections at issue in this case greatly affect the rights and liabilities of parties. Prior to the Act, Section 1981 provided a cause of action for race discrimination in the making and enforcement of contracts. *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). Section 101 of the Act expands the coverage of Section 1981 to include discrimination in the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Before the 1991 Act, Title VII claims were tried by the court, and plaintiffs could only recover back pay and other equitable relief. The new Act provides a cause of action for compensatory and punitive damages of up to $300,000 per plaintiff, to be tried before a jury. Section 102. For the first time, plaintiffs can recover for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and * * * punitive damages." *Ibid.*

Even if petitioners' contention that the presumption against retroactivity should not apply to "procedural" or "remedial" statutes were persuasive -- and it is not -- their characterization of these provisions as "procedural" and "remedial" grossly understates their significance. In addition, their argument that there is nothing unfair about applying these provisions retroactively because discrimination was illegal before the Act became law ignores reality and defies common sense. The fact that there is some overlap between Title VII and Section 1981 does not negate the fact that the Act greatly expanded the scope of Section 1981. Section 102 not only increases the amount of potential damages in Title VII cases, but it vastly expands the kinds of injuries that are subject to compensation.

The Act goes much further than increasing the compensation available for injuries already compensable under prior civil rights law, but even if that was all it did, retroactive application would not be warranted. As Judge Posner put it:

> It could be argued that since the underlying norm of nondiscrimination was not new, employers should not be heard to complain that the norm has now been given teeth. But many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the ex post facto clause. The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change. That is the philosophy behind the ex post facto clause and also behind the interpretive principle that presumes that a new civil statute applies only to conduct that occurs after its effective date. (*Luddington*, 966 F.2d at 229).

Contrary to petitioners' characterization (Landgraf Br. at 31-32), Judge Posner's argument is not that employers previously thought it acceptable to violate the antidiscrimination laws because in some circumstances the penalties were relatively

small. To the contrary, the point is that the measures employers will take to make sure violations do not occur will depend on the possible penalties. The firms regulated by the antidiscrimination laws are frequently large and complex, and can be found to violate the employment discrimination laws as a result of actions that were not taken or authorized by senior management. In addition, as this Court's caselaw demonstrates, it is not always readily apparent whether particular conduct violates the civil rights laws. The rules and procedures employers put into place to avoid violations of the civil rights laws -- or any other laws, for that matter -- quite properly depend in part on the penalties for noncompliance. To change those penalties retroactively without giving employers the opportunity to reassess their rules, procedures and activities is simply unfair.

We support those changes in the civil rights laws that will reduce or eliminate future employment discrimination. But in the context of this statute, and in other laws as well, imposing additional, unforeseen liability for past conduct is fundamentally unfair. Retroactive legislation raises serious concerns when it is passed by Congress. The traditional rule properly places the burden on Congress explicitly to make a law retroactive when it intends to do so. This Court should reaffirm that rule.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

DANIEL R. BARNEY
ATA Litigation Center
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1865

KENNETH P. KOLSON
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

JAMES D. HOLZHAUER
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
JAVIER H. RUBINSTEIN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

June 1993